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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

O & G SPRING AND WIRE FORMS SPECIALTY COMPANY

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent.

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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In reply Petitioner O&G will address misstatements in the government's opening statement in its Opposition and also respond to certain arguments suggested in the government's Opposition.

Contrary to the EEOC at page 3 of its Opposition blacks did not constitute the largest group in the pool of persons who walked in looking for a job. In fact, there were hardly any blacks in the applicant pool. Blacks were the largest group that did come to O&G and presented themselves on the second floor where applications are taken but did not ask for applications, but rather only asked to have their welfare and unemployment records verified that they were looking for a job.

The record evidence is uncontroverted that O&G hands out applications to whoever asks for one, regardless of whether it is hiring and this is per the testimony at trial of Lydia Guiterrez found in the trial transcripts pages 171 to 173 and pages 213 to 214 and by Ms. Ross at pages 1840 to 1843. O&G consistently followed this practice for clerical and secretarial employees to

state to applicants that even if they were not hiring, they were welcome to fill out an application.[1] Thus it is a misstatement to suggest that "blacks constituted the largest portion of the pool".

Similarly, there is no anecdotal evidence that blacks actually applied. The black witnesses who testified at trial all applied for jobs at times when there were no job vacancies.[2] As Judge Manion points out in dissent, there is no question in the record that there were no openings at the time these black's applied.

The hiring periods of the employer as set forth in our Petition rather than the perjoritive "hiring windows" as used in the Opposition were created for a justifiable business reason and no finding of discrimination for such hiring periods was found by any court. The EEOC used a second expert, Dr. Farrell Bloch, their expert on rebuttal, who testified with respect to the hiring periods used by O&G prior to making a hiring decision and found them to be non-discriminatory. This admission against interest coupled with the failure of any finding of discrimination based on the hiring periods should lay to rest that the hiring periods were anything other than a justifiable business purpose utilized by a small employer that had no personnel department. The "hiring period" included only looking at applications filed in the two weeks preceding the commencement of the interview process. The stale nature of the applications prior to two weeks, was as a result of the business decision of O&G that applications only have limited vitality. Beyond that period of time applicants would have changed their address or already have found a job for these slightly above minimum wage jobs.

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[1]O&G did, in fact, retain applications from 1984, 1985 forward as per the testimony of Ms. Guiterrez at Tr. 221. There was no evidence or any finding in any court that the company in any way tampered with the applications or refused applications from blacks.

[2]The authority for this claim in the Opposition is a reference to Petitioner's Appendix, page 2 referring to the decision of the Seventh Circuit which in footnote 19 adopts the reference of the District Court Judge who erroneously refers to "anecdotal evidence" without stating at 732 F.Supp. 72 at 75 what that evidence is. In Judge Leinenweber's initial decision Pet. Ap. 39(a) the only reference to anecdotal evidence is to the three black's who testified at trial, but applied at times when there was no vacancy.

The EEOC focuses on the dramatic change "in petitioner's" hiring practices after the EEOC's claim was filed. This is, in fact, a total misstatement of the record. Hiring practices followed by O&G after complaint was filed were exactly the same. O&G continued to require prior spring company experience or technical training. It continued to follow the use of hiring periods, it continued to personally interview every single employee that was hired. The only changes that occurred were external to O&G. There was a change in the nature of the neighborhood. It had been a largely Polish neighborhood. There was a newly used parking lot across the street from O&G. That parking lot was utilized largely by blacks in the neighborhood who were visiting a flea market down the street and O&G had three garage doors immediately across the street from the parking lot that were open year around, so for the first time person's could see that there was a factory there. O&G attributes the increased applicant flow after issuance of complaint to that parking lot and the changing neighborhood and third the reindustrialization of an area in which many persons lost their jobs and were now looking for work.

An examination of the period after the filing of the Complaint showed that applicant flow increased for all candidates, blacks and whites and the blacks identical to the whites that were hired in the period subsequent to issuance of complaint, in fact, met the same hiring requirements of prior Spring Company experience and prior technical training. The "hiring periods" continued to be utilized, so there was clearly no change in O&G's practices.

In the argument portion of its Opposition, the government continues to argue that the District Court and the Appellate Court considered statistical evidence in conjunction with anecdotal evidence. We submit that persons merely applying for a job at times when there is no opening does not constitute anecdotal evidence exhibiting discrimination based upon race. We would consider the kind of anecdotal evidence required to supplement statistics to be evidence from which racially discriminatory conduct can be inferred, a factor, totally absent in this case.

In addressing Petitioner's legitimate business reasons the Opposition at page 13 suggests as did the Court of Appeals that these

were "factors" taken into account by the District Court when evaluating the statistics (see Opposition, page 13). It is respectfully suggested that the Court make a close examination of the decision of the District Court. The District Court's decision is woefully inadequate. It talks about taking factors into account without referencing what they are or how they were taken into account, and makes no findings at all that are helpful in this regard. Surprisingly, the Court of Appeals majority falls right in line with this vagueness in affirming the District Court.

At page 13 and 14 of the Opposition, the government takes Petitioner to task for mischaracterizing the decision of *Teamsters* (*Teamsters v. U.S.*, 431 U.S. 324 (1977)) reading of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); even if the government is correct in its analysis on this limited point, there can be no question that the *Teamster's* Court specifically had reference to 40 separate instances or anecdotal examples of discrimination which in *Teamster's* clearly referred to separate instances of racial discrimination not simply blacks applying when there were no openings.

On the question of the publication of notices to victims, the EEOC argues the Petitioner did not properly raise this below and therefore is precluded from raising it here. This is not correct. Petitioner in its Appellant's Brief to the Seventh Circuit from page 46, 47 and 48 which are reproduced herein as an Appendix A specifically argued this issue. And at footnote 28 Appendix A specifically incorporated by reference into its Seventh Circuit argument O&G's Petition for Writ of Mandamus and Prohibition to this Court in No. 90-2209. Additionally in its Motion for clarification, Petitioner asks the Court to consider and incorporate by reference as part of Petitioner's argument, the dissenting opinion of U.S. Court of Appeals Judge Manion, insofar as he addresses this issue.

Finally in footnote 8 of the Opposition it is argued at page 15 that Petitioner waived its challenge to the hearing procedure on the remedy issue. In fact Judge Leinenweber did not permit Petitioner to conduct individual hearings even though it was pointed

out to the Judge that the Social Security search of the records of the applicants demonstrated the hiring history they filled out in their application with O&G were totally at odds with their work record under Social Security. It would have been prohibitive in terms of expense for a small employer to engage in 400 additional hearings to challenge the validity of the process. We respectfully submit that the issue has not been waived and rather has been preserved through the mandamus petition and our efforts to incorporate that by reference at the Court of Appeals level and to raise the issue once again before this Court.

With respect to the substantial justification question raised under EAJA, Petitioner respectfully states that, whatever basis the government may have had in initiating the ADEA claim in the first instance, once it went through the discovery phase, and found the large number of persons over age 40 that O&G hired as a matter of routine practice, and they nevertheless proceeded to trial, demonstrates that there could be no substantial justification for the EEOC to have gone forward with the trial. There could not be a stronger case for awarding fees under EAJA.

For all the aforesaid reasons and principally the reasons set forth in its petition, we pray that the Court accepts this case for review.

Respectfully submitted,

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APPENDIX A

(FROM APPELLANT'S BRIEF IN THE 7th CIRCUIT COURT OF APPEALS
Cause No. 92-3436; Filed April 13, 1993)

III. THE DISTRICT COURT IMPROPERLY REQUIRED THE APPELLANT TO ADVERTISE CLASS NOTICES PREMATURELY AND USED INAPPOSITE HIRING DATA IN FASHIONING A REMEDY[3]

A. CLASS NOTIFICATION IMPROPERLY PRECEDED DETERMINATION OF THE SIZE AND CHARACTERISTICS OF THE CLASS AND OF THE REMEDY

On February 26, 1990, Judge Leinenweber ordered that notice be published in four Chicago mass-market publications (the *Chicago Tribune*, the *Chicago Sun-Times*, the *Chicago Defender* and *Chicago TV Guide*) to an unidentified class of black job applicants and potential job applicants allegedly discriminated against by O&G. The form of the notice invited blacks who were looking for kick and press work in the "surrounding area" near O&G to secure a claim form from the EEOC. O&G objected to the EEOC's notice of publication because the district court had not yet determined what the appropriate remedy would be for the disparate treatment claim, had never made the preliminary determination of what percentage of O&G's hiring decisions should have gone to blacks, what percentage of blacks in the relevant labor market possessed the skills needed by O&G, and what financial award O&G could assume without putting it out of business.

The publication of notice before the preliminary finding of an appropriate remedy appears to be without precedent and makes

[3]O&G's Petition For Writ of Mandamus and Prohibition in this court (No. 90-2209) has been made part of the record in this case. The issues discussed in this section were fully briefed in those proceedings, and O&G respectfully draws this court's attention to the fuller exposition of these arguments therein.

little sense. In *EEOC v. Riss International Corp.*, 525 F. Supp. 1094 (W.D.Mo. 1981), *EEOC v. Cook Paint & Varnish Co.*, 35 F.E.P. Cases 43. Mo. 1981) and *Chicago Miniature* (district court) *supra*, publication was ordered only after determination of the remedy. Unless the shape of the remedy would change as a result of notification, publication before remedy determination is premature. (There is no indication that Judge Leinenweber contemplated changing the amount of money due: "The amount of people will not necessarily increase the amount of money your client owes, if I rule that way." [February 20, 1990 Tr. at 7.])

The hypothetical victims. Essentially, publication is tantamount to a search for victims— ironic, in that this case is notable for its ascription of liability to O&G without the identification of a single "victim" at trial. (*See* discussion of EEOC's witnesses, *supra.*) It is disproportionate in the extreme to take a measure sure to surface a large number of claimants when, with all the resources available to the EEOC at trial, it was unable to produce a single individual victim of discrimination.

An invitation to mischief. The blunderbuss notice O&G was required to publish unfortunately constituted an open invitation to commit fraud on the court. With permission of the court, O&G researched the Social Security records of a large percentage of the claimants. The results were startling: several glaring inconsistencies existed between experience information provided on the claim forms and documented information in the claimants' Social Security records. (*See* Record O&G's Motions dated 7/3/91.)

Inappropriate claimants. The district court allowed no attempt to separate wheat from chaff among the claimants, permitting no inquiry into whether they had in fact applied when O&G was hiring or whether they possessed desired backgrounds— in short, whether they would in fact have been hired absent discrimination on O&G's part.

Despite the above abuses, the district court refused to examine the qualifications of individual claims, lumping them all into a homogeneous pool of equal merit for the purpose of dividing up O&G's payment.

The effect was to turn a make-whole remedy into a punitive exercise against O&G, with O&G incurring substantial business and financial burdens before this court had the opportunity to review the district court's decision.

O&G does not seek a remand of this case. If this court affirms the district court, O&G suggests, as a responsible corporate citizen, that this court should nevertheless examine the propriety of ordering class notification before determination of key elements of the remedy; prudence should dictate waiting until an appellate court has spoken before undertaking mass notification. If O&G prevails in this appeal, it seeks its out-of-pocket expenses associated with the remedy phase and attorneys' fees, including fees for the mandamus action.